Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

AVROM R. VANN; SHIRLEY E. VANN,

Petitioners,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED FOR REVIEW

Where (a) after the expiration of the Statute of Limitations the Internal Revenue Service ("IRS") first makes an assessment against a taxpayer, and (b) when the taxpayer refuses to pay the taxes and interest so assessed, the Internal Revenue Service seizes funds on deposit in the taxpayer's bank account for the full amount of the untimely assessment and additional interest thereon, does the taxpayer have any remedy in the Courts or is this yet another instance of abuse by the Internal Revenue Service for which a United States citizen has no remedy?

PARTIES TO THE PROCEEDING

Avrom R. Vann and Shirley E. Vann,

Petitioners,

United States of America, Department of the Treasury, Internal Revenue Service,

Respondents.

There are no publicly owned parent companies or subsidiaries of any of the parties hereto.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Avrom R. Vann and Shirley E. Vann (the "Taxpayers") pray that this Court issue a writ of certiorari to review the Questions Presented and those fairly included therein.

The Courts below, which found the IRS first assessed the Taxpayers after the expiration of the applicable statute of limitations, held that under 28 U.S.C. 1346(a)(1) the Taxpayers, as members of a partnership, have no judicial remedy against this clear abuse by the IRS apparently concluding that the taxpayers cannot recover the monies so illegally removed from their bank account. This request for certiorari follows.

OPINION BELOW

The only opinion below was delivered by the United States District Court for the District of New Jersey is reported except at 1997 U.S. Dist. LEXIS 4695; 97-1 U.S. Tax Cas. (CCH) P50,415; 79 A.F.T.R.2d (P-H) 2052 and is located at Appendix Page A1. The Judgment Order of the United States Court of Appeals for the Third Circuit is unreported except at 1997 U.S. App. LEXIS 38528 and is located at Appendix Page A7.

JURISDICTION OF THE DISTRICT COURT

The Judgment of the United States Court of Appeals for the Third Circuit was entered on December 18, 1997. Jurisdiction to review this petition by writ of certiorari is

conferred upon the Court by 28 U.S.C. 1254(1). The District Court had jurisdiction over the claims in the first instance under the provisions of 28 U.S.C. 1331, 1340, 1346 and Internal Revenue Code Section 7402(e). The text of each of these statutes is set out verbatim in the appendix hereto.

JURISDICTION OF THE COURT OF APPEALS

Jurisdiction in the Court of Appeals existed under 28 U.S.C. Section 1291 on the grounds that the appeal to the Court of Appeals was from a final Order of the United States District Court for the District of New Jersey. The Taxpayers served and filed their Notice of Appeal to the Court of Appeals for the Third Circuit on April 2, 1997 from an Order filed March 27, 1997 in the District Court which granted Summary Judgment to the Respondents herein dismissing the Taxpayers' Complaint and which denied the Cross-Motion of the Taxpayers for Summary Judgment.

Subject matter jurisdiction exists pursuant to 28 U.S.C. Section 1346(a)(1).

STATEMENT OF THE CASE

Petitioner, Avrom R. Vann was a partner in Kent Associates II ("Kent") which was a further partner in The Securities Group 1980 which in turn was a further partner in The Securities Group ("Securities Group"). The Taxpayers and the United States of America agree that the

applicable Statute of Limitations is determined under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA").

Under Internal Revenue Code ("IRC") Section 6229(d) the TEFRA Statute of Limitations against a partner of a partnership for a partnership item expires three years from the later of (i) the due date for filing of the partnership return or (ii) the date on which the partnership return was filed. The partnership item adjustments are then applied to the partners' returns by means of a computational adjustment made at the conclusion of the partnership proceeding. However, where, as in the present case, the IRS issues an FPAA within the time limitation set forth in IRC Section 6229(a), the time allowed to the IRS to make a computational adjustment is extended to one year after the FPAA adjustments become final.

On October 15, 1987 the IRS issued a Notice of Final Partnership Administrative Adjustment ("FPAA") to the Securities Group for its 1983 Tax Year. The IRS disallowed interest expenses claimed by the Securities Group as a deduction and the IRS accordingly adjusted the 1983 income of Securities Group. No Petition for readjustment was filed with respect to the FPAA. Accordingly, the one year period available to the IRS to assess the partners of Securities Group (which included partners of Kent) expired on March 13, 1989, which is one year after the FPAA became final.

The District Court, which found the assessment was first made after the expiration of the TEFRA statute of limitations, held that notwithstanding the fact that assessment was made after the statute of limitation expired,

because the assessment arose from the disallowance of a deduction taken by a partnership in which the Taxpayers had been a partner, under 26 U.S.C. 7422(h) the Taxpayers are precluded from maintaining an action against the United States of America. The Court below, which made no distinction between an assessment made within the applicable TEFRA statute of limitations and an assessment only made after the expiration of the TEFRA statute of limitations, appeared to consider 28 U.S.C. 1346(a)(1) unavailable to the Taxpayers.

The Court of Appeals for the Third Circuit affirmed by a Judgment Order without furnishing any explanation or rationale for its affirmance. This Court has never before interpreted the interplay of these three statutory provisions. The Courts below have rendered meaningless the TEFRA Statute of Limitations since the IRS is now free to assess a partner at any time, even after the expiration of the Statute of Limitations, and to levy upon the assets and properties of the Taxpayers, without being subject to judicial review, which certainly is not the intent of TEFRA nor the intent of Congress and is unconscionable.

The Taxpayers and the government both agreed that where the assessment is timely made by the IRS, under the governing statute the partnership and not the individual partner must proceed in Court. Of course, the statute does not contemplate and therefore does not specify what occurs where the IRS, after the expiration of the governing statute of limitations, first makes an assessment against an individual partner. Does the taxpayer then have a right to challenge the IRS in court, given the fact that the partnership no longer has any interest or

standing to act? The issue presented to the Courts below and this Court are:

What rights to judicial review does a taxpayer have where the IRS first makes an assessment *after* the TEFRA statute of limitations expires?

Is an assessment made after the expiration of the statute of limitations an assessment on which the IRS may levy?

Is an assessment first made after the expiration of the statute of limitations an assessment based upon a partnership item as contemplated by TEFRA?

If after the expiration of the statute of limitations the IRS can assess and levy and the taxpayer has no redress, what purpose does the statute of limitations serve?

Assuming that 28 U.S.C. 7422(h) supersedes the provisions of 28 U.S.C. Section 1346(a), does that continue to be the case after the expiration of the TEFRA statute of limitations?

Is an assessment and collection of income taxes made after the expiration of the TEFRA Statute of Limitations an erroneously or illegally assessed or collected tax wrongfully collected under the internal-revenue laws to invoke judicial intervention under 28 U.S.C. 1346(a)?

ARGUMENT

Denying judicial review to Taxpayers whose bank accounts were seized by the IRS without any prior judicial proceedings or authorization, solely based upon an

income tax assessment which the District Court found was made only after the expiration of the applicable Statute of Limitations departs from the accepted and usual course of judicial proceedings to warrant the exercise by this Court of its supervisory power. The construction to be given to the interplay of (i) the TEFRA Statute of Limitations, (ii) 26 U.S.C. 7422(h) which limits the rights of an individual partner to commence a lawsuit to determine a partnership deduction, and (iii) 28 U.S.C. 1346(a)(1) which provides a judicial remedy for a taxpayer to recover illegally collected taxes, raises an important question of federal law which has not been, but should be, settled by this Court.

Both the District Court and the Court of Appeals incorrectly applied 26 U.S.C. 7422(h), which governs assessments timely made by the IRS before the expiration of the TEFRA Statute of Limitations, to preclude judicial review where the IRS first made an assessment after the expiration of the TEFRA Statute of Limitations, which could not have been the statutory intent nor the intent of Congress. Such a statutory construction renders meaningless the TEFRA Statute of Limitations.

After receiving notice of the assessment, the Taxpayers advised the IRS that the assessment was made after the expiration of the Statute of Limitations and requested the IRS to furnish authority for its claimed right to enforce collection of the assessment. The IRS did not furnish any basis to the Taxpayers for its alleged right to make the assessment after the Statute of Limitations expired. Instead the IRS simply proceeded to twice levy upon a bank account of the Taxpayers and to collect the full amount of the wrongfully assessed income taxes and

the interest which the IRS calculated to be due and owing.

The District Court expressly found that the Taxpayers timely made application for a refund which was denied by the IRS and that the Taxpayers timely commenced their action in the District Court to recover the taxes and interest so collected by the IRS. The District Court further found that the TEFRA Statute of Limitations expired on March 13, 1989, one year after the FPAA became final. The District Court expressly refused to consider the contention of the Respondents that a six year statute was applicable finding that Respondents failed to comply with the Court's Discovery timetables. However, because the assessment has its origins in the denial of deductions taken by the Securities Group, the District Court concluded it was powerless to exercise jurisdiction by virtue of 26 U.S.C. 7422(h). In this holding both the District Court and the Court of Appeals were in error, so much so that exercise of the supervisory powers of this Court are appropriately exercised.

The Taxpayers did not commence their action to challenge any computation made by the IRS concerning Securities Group. In fact, the Taxpayers did not dispute the fact that they lacked standing to maintain any such action. The Taxpayers did commence their action to recover income taxes and interest assessed after the expiration of the Statute of Limitations and illegally collected under internal-revenue laws. Jurisdiction to maintain such a suit exists under 28 U.S.C. 1346(a). The District Court never considered this express statute, erroneously applying 26 U.S.C. 7422(h) to the facts.

Under the District's Court construction of 26 U.S.C. 7422(h), Congress enacted a TEFRA Statute of Limitations specifically establishing a time limitation in which the IRS may assess a taxpayer who is a member of a partnership for income taxes owing by virtue of the taxpayers' participation in such partnership but also enacted a separate statute which says that if the IRS assesses an individual partner after the expiration of the TEFRA Statute of Limitations and collects the taxes assessed, the taxpayer has no remedy in any forum. Such a statutory construction is absurd, defies logic and experience, renders meaningless the TEFRA Statute of Limitations and is incongruous with the construction which is mandated by the three separate governing statutory provisions, namely, (i) the TEFRA Statute of Limitations, (ii) 26 U.S.C. 7422(h) which limits the rights of an individual partner to commence a lawsuit to determine a partnership deduction, and (iii) 28 U.S.C. 1346(a)(1) which provides a judicial remedy for a taxpayer to recover illegally collected taxes. The only construction which gives effect to each of the three separate statutory provisions is simply that if an assessment is made against a partner prior to the expiration of the TEFRA Statute of Limitations, then under 26 U.S.C. 7422(h) only the partnership and not the partner may proceed in Court. However, if an assessment is first made against a partner after the expiration of the TEFRA Statute of Limitations, then 26 U.S.C. 7422(h) is inapplicable and the individual partner may proceed under 28 U.S.C. 1346(a)(1) to recover taxes illegally collected. This latter construction, which gives effect to each of these three separate statutory provisions depending upon whether an assessment is made before or after the expiration of

the TEFRA Statute of Limitations, does not render any of these three statutes meaningless but rather gives effect to each section in the appropriate set of circumstances.

Equally ironic is the result mandated by the Courts below that a Taxpayer may enjoin collection of an assessment before seizure by the IRS where the taxpayer can establish facts to support equity jurisdiction and can show that the government cannot prevail on the merits *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S. Ct. 1125, 1129, 8 L. Ed. 2d 292 (1962) or where Congress has provided no alternate means of challenging the validity of a tax, *South Carolina v. Regan*, 465 U.S. 367, 378-79, 79 L. Ed. 2d 372, 104 S. Ct. 1107, 1114-15 (1984) and yet the Taxpayers cannot have access to the Courts after the IRS wrongfully assesses and actually illegally collects the taxes and interest. This absurd result is the law as expounded by the District Court and affirmed by the Court of Appeals. Of course, were it any agency of the United States other than the IRS, the levy could not have been made absent a prior judicial hearing and determination as any other agency would have had to institute legal proceedings to obtain a judgment against the claimed obligor before any levy could have been made, thereby affording the alleged obligor (equivalent to the Taxpayer in the instant case) the opportunity for advance judicial review.

The District Court concluded that an untimely assessment retains its partnership item status under 26 U.S.C. 7422(h) even after the expiration of the TEFRA Statute of Limitations. The District Court could cite no authority for this remarkable conclusion and in fact no such authority exists. As the District Court observed the Statute was

intended to promote judicial economy and consistency of results; yet its own interpretation defies this very standard since it defies any consistency in the application of the TEFRA Statute of Limitations, which specifically sets the outside date by which the IRS may act to assess an individual member of a partnership with respect to a partnership item.

CONCLUSION

This documented abuse by the IRS and denial of redress in the Courts by virtue of a gross misapplication of the controlling statutes, clearly warrants review by this Court to settle this important question of statutory construction of the three separate provisions in a manner which gives full meaning to each section and does not render any of the three sections meaningless. If the present holding of this case is not reviewed and reversed by this Court, the Federal Court system has determined that it is powerless in the face of the IRS utterly disregarding its statutory limitations.

Petitioners respectfully request that this petition be granted and that a writ of certiorari be issued.

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APPENDIX

Text of District Court Opinion

AVROM R. VANN and SHIRLEY E. VANN, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.

Civ. No. 96-132 (DRD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

March 27, 1997, Decided
March 27, 1997, ORIGINAL FILED

NOTICE: NOT FOR PUBLICATION

DISPOSITION: Defendants' motion for summary judgment granted, and plaintiffs' cross-motion for summary judgment denied.

COUNSEL: Appearances:

Avrom R. Vann, Esq., Fairlawn, New Jersey, Attorney for Plaintiffs.
Faith S. Hochberg, United States Attorney by Susan C. Cassell, Esq., Assistant U.S Attorney, United States Attorney, District of New Jersey, Newark, New Jersey. Of Counsel: Lawrence P. Blaskopf, Esq., Trial Attorney, Tax Division, U.S. Department of Justice, Washington, D.C., Attorneys for Defendants.

JUDGES: Dickinson R. Debevoise, U.S.S.D.J.

Plaintiffs instituted this action against defendants to recover an income tax refund for the 1983 tax year. Plaintiffs seek a refund of $ 36,103.56 plus interest. This sum represents the amount the Internal Revenue Service appropriated in 1991 through two levies on plaintiffs' bank accounts, and applied to a tax assessment against

plaintiffs for the 1983 tax year. Defendants move for, and plaintiffs cross move for, summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, defendants' motion is granted, and plaintiffs' cross-motion is denied.

BACKGROUND

Plaintiffs, Avrom R. Vann and Shirley E. Vann, filed their amended joint income tax return for the year 1983 ("the 1983 Tax Return") on December 9, 1985. Plaintiffs' income shown on the 1983 Tax Return reflected partnership losses attributable to Avrom R. Vann's ownership of a partnership interest in Kent Associates II. Kent Associates II was a partner of a larger partnership known as Securities Group 1980. Securities Group 1980, in turn, was a partner of a partnership known as The Securities Group.

On October 15, 1987, the Internal Revenue Service (I.R.S.) issued a Notice of Final Partnership Administrative Adjustment (FPAA) to The Securities Group for its 1983 tax year. The I.R.S. determined that interest expenses claimed by The Securities Group should be disallowed as a deduction, and it adjusted the partnership's income accordingly.[1]

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[1] It should be noted that because of defendants' failure to comply with Magistrate Chesler's Discovery timetable, the fraud evidence recently submitted by defendant, (i.e. the indictment of Charles Atkins, the general partner of The Securities Group and Securities Group 1980, and the Amended Judgment and Probation/Commitment Order concerning Charles Atkins), will not be considered by the court.

The I.R.S. notified plaintiffs by letter dated August 22, 1990 that it planned to assess plaintiffs with respect to the 1983 Tax Return for their ownership interest in Kent Associates II. The I.R.S. determined that plaintiff's share of Kent Associates II's income was greater than what they reported on their 1983 income tax return. Specifically, plaintiffs reported in their amended income tax return that their share of income from Kent Associates II was $ 12,546.00 in 1983. The I.R.S. subsequently determined that plaintiffs' share of income from Kent Associates II in 1983 was $ 52,481.00. Accordingly, the I.R.S. advised plaintiffs that they owed $ 17,568.00 of additional tax.

Shortly after receiving the letter dated August 22, 1990, plaintiff Avrom R. Vann contacted an I.R.S. representative by telephone, and later by letter, to inquire as to the bases for the proposed assessment. Plaintiff Avrom R. Vann requested copies of all documents upon which the I.R.S. was relying in claiming that it could interpose the assessment. The I.R.S. did not produce any such documentation.

On September 17, 1990, the I.R.S. actually assessed plaintiffs with the $ 17,568.00 of additional tax. Plaintiffs refused to pay this amount on the grounds that the assessment was untimely and improper. On July 10, 1991, the I.R.S. proceeded to levy upon plaintiffs' bank account at the Saving Bank of Rockland and withdrew $ 35,674.53. On December 21, 1991, the I.R.S. withdrew a further sum of $ 429.03 for a total of $ 36,103.56. This amount constituted the principal amount of the assessment and the interest and penalties imposed by the I.R.S. through the date of the second levy.

On May 25, 1993, plaintiffs filed a claim for a tax refund for the 1983 Tax Year with the I.R.S. On March 25, 1994, the I.R.S. denied the claim.

STANDARD OF REVIEW

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), rev'g, 723 F.2d 238 (3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. Sound Ship Bldg. Corp. v. Bethlehem Steel Co., 533 F.2d 96, 99 (3d Cir. 1974), cert. denied, 429 U.S. 860, 50 L. Ed. 2d 137, 97 S. Ct. 161 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The mere existence of some alleged factual dispute

between the parties, however, will not defeat an otherwise properly supported motion for summary judgment. Id. at 247-248.

ANALYSIS

The first issue presented is whether the court has subject matter jurisdiction over this action. As a general rule, district courts have jurisdiction over refund claims. 28 U.S.C. Section 1346(a)(1).[2] To bring an income tax refund suit in a district court, two basic requisites must be met. First, the taxpayer must pay the assessed tax. See Flora v. United States, 362 U.S. 145, 4 L. Ed. 2d 623, 80 S. Ct. 630 (1960); Koss v. United States, 69 F.3d 705, 707 (3d Cir. 1995). Second, the taxpayer must file an administrative claim for refund or credit with the I.R.S. 26 U.S.C. Section 7422.[3] In the instant case, plaintiffs have clearly satisfied both of these requirements. Plaintiffs paid the

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[2] Section 1346(a)(1) accords the district court original jurisdiction over any "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . " 28 U.S.C. Section 1436(a)(1).

[3] Section 7422(a) provides:

> No suit prior to filing claim for refund. – No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

assessed tax via the two levies placed on their bank accounts at the Saving Bank of Rockland. Moreover, plaintiffs filed an administrative claim for refund or credit with the I.R.S. on May 25, 1993. Plaintiffs' Exhibit 6.

In advancing its argument that the court lacks subject-matter jurisdiction, however, defendants rely on the jurisdictional limitation delineated in 26 U.S.C. Section 7422(h). Section 7422 provides that "no action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c)." Hence, the critical inquiry for purposes of resolving the subject-matter jurisdiction issue is whether the instant refund action is attributable to partnership or nonpartnership items. As the Fifth Circuit Court of Appeals explained in Alexander v. United States, 44 F.3d 328 (5th Cir. 1995):

> If the refund is attributable to partnership items, section 7422(h) applies and deprives the court of jurisdiction. If, on the other hand, the refund is attributable to nonpartnership items, then section 7422(h) is irrelevant, and the general grant of jurisdiction is effective.

Id. at 331; see also Koss, 69 F.3d at 707 (holding that other statutory provisions placing requirements or restrictions on refund actions limit and determine the scope of the section 1346 grant of jurisdiction).

Section 6231(a)(3) defines partnership items as "any item required to be taken into account for the partnership's taxable year . . . to the extent regulations . . . provide that . . . such item is more appropriately determined at the partnership level than at the partner

level." 26 U.S.C. Section 6231(a)(3). More specifically, the Treasury Regulations define partnership items as "items of income, gain, loss, deduction or credit of the partnership." Treas. Reg. Section 301.6231(a)(3)-1(a)(1)(i); see also Bob Hamric Chevrolet, Inc. v. USA, Internal Revenue Service, 849 F. Supp. 500, 510 (W.D. Tex. 1994).

In the instant case, plaintiffs are seeking a refund of taxes the I.R.S. assessed and collected as a result of Mr. Vann's participation in the Kent Associates II partnership. The I.R.S. assessed additional tax against plaintiffs because it determined that Kent Associates II had income in addition to what it reported for the 1983 tax year. This additional income stemmed from disallowance of interest expense deductions claimed by The Securities Group, a partnership in which Mr. Vann was a third tier partner.[4] Plaintiffs' refund action is therefore clearly attributable to a "partnership item", namely deductions of a partnership, within the meaning of 26 U.S.C. Section 6231(a)(3).

Notwithstanding section 7422(h)'s general prohibition against the institution of refund actions attributable to partnership items, there are two limited exceptions to this rule. 26 U.S.C. Section 7422(h). First, section 6228(b) permits refund actions where a partner files a request for an administrative adjustment pursuant to section 6227(c). See 26 U.S.C. Section 6227-8, 7422. Section 6227(a) requires that such requests be filed within three years of the filing of the partnership return. In this case, plaintiffs

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[4] Mr. Vann was a partner of Kent Associates II, which was a partner of the Securities Group 1980 partnership, which was a partner of The Securities Groups, the partnership that claimed the interest expense.

failed to file a request for administrative adjustment within three years of the filing of Kent Associates II's tax return. Hence, their refund action is not permitted by 26 U.S.C. Section 6228(b).

The second exception to the general rule that partners cannot bring refund actions attributable to partnership items is 26 U.S.C. 6230(c). Section 6230(c)(1) authorizes refund claims on the grounds that:

> (A) the Secretary erroneously computed any computational adjustment necessary – (i) to make the partnership items on the partner's return consistent with the treatment of the partnership items on the partnership return, or (ii) to apply to the partner a settlement, a final partnership administrative adjustment, or the decision of a court in an action brought under section 6226 or section 6228(a),
>
> (B) the Secretary failed to allow a credit or to make a refund to the partner in the amount of the overpayment attributable to the application to the partner of a settlement, a final partnership administrative adjustment, or the decision of a court in an action brought under section 6226 or section 6228(a).

26 U.S.C. Section 6230.

In the case at bar, plaintiffs do not aver that their suit concerns either of the grounds set forth in section 6230(c). As Mr. Vann himself conceded at his deposition, the only basis for bringing the instant refund action is that the additional assessment of tax by the I.R.S. was allegedly barred by the statute of limitations. See Deposition of Avrom R. Vann at page 35, lines 11-17. Hence, plaintiffs

do not satisfy the second exception to section 7422 for bringing an income tax refund action. 26 U.S.C. Section 7422.

In short, plaintiffs maintain that they are entitled to a tax refund on the basis that the I.R.S.'s assessment of additional tax attributable to their participation in Kent Associates II was untimely and therefore invalid. Such an action does not fall within the grounds for refund actions permitted by 26 U.S.C. 7422(h). Cf., Kuralt v. United States, 866 F. Supp. 727 (S.D.N.Y.), aff'd 40 F.3d 25 (2d Cir. 1994). The statute was intended to promote judicial economy and consistency of results, and to facilitate comprehensive settlements, by enabling the courts and the I.R.S. to address issues affecting the entire partnership in a single forum. Beard v. United States, 992 F.2d 1516, 1519 (11th Cir. 1993) (citing H.R.Conf.Rep. No. 97-760, 97th Cong., 2d Sess. 599 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1190, 1371). Accordingly, defendants' motion for summary judgment is granted, and plaintiffs' cross-motion for summary judgment is denied. I shall file an appropriate order implementing this opinion.

Dickinson R. Debevoise, U.S.S.D.J.

Dated: March 27, 1997

District Court Order

This matter having been opened to the Court by Faith S. Hochberg, United States Attorney for the District of New Jersey, Susan C. Cassell, Assistant United States Attorney, and Lawrence P. Blaskopf, Trial Attorney for the Tax Division, attorneys for the defendants, on a motion for summary judgment, and by Avrom R. Vann, Esq., attorney for the plaintiffs, on a cross motion for summary judgment, notice having been given to all parties, in consideration of the papers submitted, for good cause shown, and for the reasons set forth in the Court's opinion of even date,

IT IS, on this 27th day of March 1997,

ORDERED as follows:

1. Defendants' motion for summary judgment is GRANTED, and the Complaint is dismissed with prejudice.

2. Plaintiffs' cross-motion for summary judgment is DENIED.

Dickinson R. Debevoise, U.S.S.D.J.

JUDGMENT ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT

AVROM R. VANN; SHIRLEY E. VANN, Appellants v. UNITED STATES OF AMERICA; DEPARTMENT OF THE TREASURY; INTERNAL REVENUE SERVICE

No. 97-5175

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 11, 1997, Submitted under Third Circuit LAR 34.1(a)
December 18, 1997, Decided

PRIOR HISTORY: On Appeal from the United States District Court for the District of New Jersey. (D.C. Civil Action No. 96-cv-00132). (District Judge: Hon. Dickinson R. Debevoise).

JUDGES: Before: GREENBERG, ROTH, and SEITZ, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellants,

IT IS ADJUDGED AND ORDERED that the judgment of the district court entered March 27, 1997, be and is hereby affirmed.

Text of the Statutes involved

26 U.S.C. Section 6229(d)

(d) Suspension when secretary makes administrative adjustment. If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended –

(1) for the period during which an action may be brought under section 6226 (and, if a petition is filed under section 6226 with respect to such administrative adjustment, until the decision of the court becomes final), and

(2) for 1 year thereafter.

26 U.S.C. Section 7422(h)

(h) Special rule for actions with respect to partnership items. No action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c).

28 U.S.C. Section 1340. Internal revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade.

28 U.S.C. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1346(a)

The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

Supreme Court, U.S.
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No. 97-1553

In the Supreme Court of the United States

OCTOBER TERM, 1997

AVROM R. VANN AND SHIRLEY E. VANN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had jurisdiction over this suit for refund of tax attributable to a partnership item.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A11) is unpublished, but the decision is noted at 135 F.3d 768 (Table). The opinion of the district court (Pet. App. A1-A10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1997. The petition for a writ of certiorari was filed on March 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant portions of the Internal Revenue Code are set forth at Pet. App. A12-A13 and in the Appendix, *infra*, 1a-2a.

STATEMENT

1. Petitioners Avrom and Shirley Vann filed a joint income tax return for 1983 reporting $12,546 in income attributable to Mr. Vann's participation in a partnership known as Kent Associates II (Pet. App. A2; C.A. App. 152-160). Kent Associates II was a partner in a partnership named Securities Group 1980, which in turn was a partner in a partnership named The Securities Group (*ibid.*).

On October 15, 1987, the Internal Revenue Service sent The Securities Group a Notice of Final Partnership Administrative Adjustment (FPAA) that disallowed a $225,682,465 interest expense deduction claimed on the partnership return for 1983. The deduction was disallowed because it resulted "from pre-arranged, rigged and sham transactions in U.S. Treasury bills and securities" (Pet. App. A2; C.A. App. 246, 248-249). The mailing of the FPAA commenced the running of the 150-day period within which suit could be commenced to contest the proposed adjustment. 26 U.S.C. 6226(a), (b). No such action was filed and the administrative adjustment of the partnership return therefore became final.

The disallowance of the claimed deduction increased the taxable income of The Securities Group and thereby increased the distributive shares of taxable income to each of the partners, including Securities Group 1980. The increase in

the taxable income of Securities Group 1980 flowed through to Kent Associates II and to each of its partners, including Mr. Vann. As the result, his distributive share of partnership income from Kent Associates II was increased by approximately $40,000 (Pet. App. A3).

The Internal Revenue Service notified petitioners on August 22, 1990, that additional tax was due for 1983 in the amount of $17,568. The Service thereafter assessed the additional tax, plus $17,222.61 in interest, on September 17, 1990. These sums were collected through a levy on petitioners' bank account (Pet. App. A3). Petitioners then brought this suit in federal district court seeking a refund of taxes.

2. The district court dismissed the refund suit. Section 7422(h) of the Internal Revenue Code provides that "no action may be brought for a refund attributable to partnership items * * * except as provided in section 6228(b) or section 6230(c)." 26 U.S.C. 7422(h). Although Section 6228(b) permits a refund suit for taxes attributable to a partnership item if a partner has filed a request for administrative adjustment with the Service, the district court found that exception inapplicable to this case because petitioners had not filed any such request (Pet. App. A7-A8). The court further noted that, while a refund suit could be brought under Section 6230(c)(1) if the Service had erroneously computed a mathematical adjustment to the partnership return, that exception was also inapplicable here because no such error had occurred and petitioners had not contended to the contrary (Pet. App. A8-A9). The district court therefore dismissed the action for lack of subject

matter jurisdiction. Having done so, the court did not reach the question raised by petitioner as to whether the taxes they owed had been timely assessed.

3. The court of appeals affirmed the judgment of the district court in a one-sentence order (Pet. App. A11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under 26 U.S.C. 7422(h), a partner may sue for refund of tax attributable to a corrected partnership item only when a request for administrative adjustment of the partnership return has been disallowed (26 U.S.C. 6228(b)) or when the Secretary has failed correctly to compute the mathematical adjustment that flows to the partner's return from a final partnership adjustment (26 U.S.C. 6230(c)). Neither of those circumstances is present here.

a. Partnerships are not directly subject to the federal income tax. Instead, each partner is liable for the tax that results from the income attributable to his or her allocable share of the partnership activities. Partnerships nevertheless must file annual information returns that report each partner's distributive share of partnership income or loss. See 26 U.S.C. 701, 6031; 26 C.F.R. 1.701-1, 1.6031-1(a)(1); *United States* v. *Bayse*, 410 U.S. 441, 448 (1973). To achieve consistent treatment of all partners, and to reduce the burden of duplicative proceedings, Sections 6221-6233 of the

Internal Revenue Code provide a single, unified administrative and judicial proceeding for review of the partnership return. See Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 402(a), 96 Stat. 648-669; H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 599 (1982). Under these provisions, adjustment of a "partnership item"—such as items of income or loss—must be made in the unified proceeding available only at the partnerhip level. 26 U.S.C. 6231(a)(3); 26 C.F.R. 301.6231(a)(3)-1(a)(1)(i); *Randell* v. *United States*, 64 F.3d 101, 107-108 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996).

To audit a partnership return under these procedures, the Internal Revenue Service must send notice to the partners of the commencment of the audit.[1] 26 U.S.C. 6223(a)(1). The "tax matters partner," who has authority to act on behalf of the partnership in its dealings with the IRS (26 U.S.C. 6231(a)(7)), is responsible for keeping each partner informed of the progress of partnership proceedings (26 U.S.C. 6223(g)). Any partner, however, has

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[1] If the partnership has more than 100 partners, the IRS need only notify partners with at least one percent profits interest in the partnership, except that groups of partners having, in the aggregate, at least a five percent profits interest may request notification. Unless the IRS is furnished with the names, addresses and profits interests of indirect partners, a partner that is a "pass-thru partner"—such as a partnership, estate, trust, Subchapter S corporation or nominee—has the obligation to forward, within 30 days, any notice concerning a partnership administrative proceeding to the indirect partners (26 U.S.C. 6223(h)). See 26 U.S.C. 6223(b), (c)(3).

the right to participate in the administrative proceedings. 26 U.S.C. 6224(a).

If the Service disagrees with any item reported on the partnership return, the Service must send a notice of final partnership administrative adjustment (FPAA) to each partner entitled to notice before making any assessment attributable to the disputed item. 26 U.S.C. 6223(a)(2), (d)(2). The tax matters partner has 90 days from the mailing of this notice to file a petition for judicial review of the administrative determination. 26 U.S.C. 6226(a). If the tax matters partner does not file such a petition within that period, any notice partner or 5-percent group has a further 60 days after the close of the 90-day period within which to bring such a suit. 26 U.S.C. 6226(b). If such a petition is filed, all affected partners are treated as parties. 26 U.S.C. 6226(c), (d). The court then has jurisdiction to determine all partnership items to which the FPAA relates and the proper allocation of such items among the partners. 26 U.S.C. 6226(f). When a valid petition is not filed, however, the tax treatment of partnership items as administratively adjusted by the IRS is deemed conclusively established as a matter of law. *Randell* v. *United States*, 64 F.3d at 108.

During the 150-day period that a petition may be filed to contest an FPAA, the Service generally may not assess a deficiency attributable to a partnership item. If such an action is filed, the Service may not assess the deficiency until the decision of the reviewing court has become final. 26 U.S.C. 6225(a)(1), (a)(2). If a proceeding is not begun, however, the restrictions on assessment expire (26 U.S.C. 6225(c)) and the Service is free to

make assessments against individual partners that flow from the "computational adjustment" (26 U.S.C. 6231(a)(6)) that results from the adjusted treatment of the partnership item in the FPAA. In any suit seeking recovery of a tax paid upon such an assessment, the treatment of partnership items in the FPAA "shall be conclusive." 26 U.S.C. 6230(c)(4).

b. To complement the foregoing provisions and to ensure a single, unified determination of partnership items, the normal provisions governing refund suits are expressly rendered inapplicable to claims for refunds attributable to partnership items. 26 U.S.C. 6230(d)(6), 6511(g). Section 7422(h) of the Code contains an express limitation on a taxpayer's ability to maintain a refund suit in respect of a partnership item. That Section, which is entitled "Special rules for actions with respect to partnership items," provides that "[n]o action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c)." 26 U.S.C. 7422(h).

As the courts below correctly concluded, the two statutory exceptions to such refund suits are unavailable on the facts of this case. Section 6228(b) is inapplicable because it permits a suit for refund only when the IRS has failed to allow in full a partner's request for administrative adjustment (26 U.S.C. 6228(b)), and no such request for adjustment was made in this case. Section 6230(c) is inapplicable because it permits a suit for refund only when the IRS has erroneously computed the adjustment on an individual partner's return that results from the final adjustment of the part-

nership item (26 U.S.C. 6230(c)), and no such erroneous computation was alleged to occur in this case. Because neither of these two statutory exceptions apply to this case, the courts below correctly dismissed petitioners' refund action.

2. Indeed, petitioners do not contend that either of the exceptions found in 26 U.S.C. 7422(h) applies to this case. Instead, petitioners assert that 26 U.S.C. 7422(h) is inapplicable to this case because their refund suit is based on an error in the assessment procedure rather than on an error in the treatment of a "partnership item[ ]." The courts below correctly rejected that claim.

a. Under the plain language of 26 U.S.C. 7422(h), it is the origin and character of the item of income as a "partnership item[ ]" that determines jurisdiction over a refund suit. The taxpayer's theory of recovery does not affect the jurisdictional limitations of that provision. To achieve the statutory goals of avoiding piecemeal litigation and ensuring a single, unified determination of partnership tax liabilility, courts have consistently held that the statute of limitations on an assessment of tax attributable to a partnership item is an issue to be determined at the partnership level. *Kaplan* v. *United States*, 97-1 U.S. Tax Cas. (CCH) ¶ 50,418, at 88,042 (N.D. Ill. 1997), aff'd, 133 F.3d 469 (7th Cir. 1998); *Thomas* v. *United States*, 967 F.Supp. 505, 506 (N.D. Ga. 1997); *Anderson* v. *United States*, 93-1 U.S. Tax Cas. (CCH) ¶ 50,360, at 88,404 (N.D. Cal. 1993), aff'd, 50 F.3d 13 (9th Cir. 1995) (Table); *Crowell* v. *Commissioner*, 102 T.C. 683, 693 (1994); *Genesis Oil & Gas, Ltd.* v. *Commissioner*, 93 T.C. 562, 565 (1989). Because the statute of limitations on assessment of a

partnership item is itself a matter appropriately determined at the partnership level, courts have strictly applied 26 U.S.C. 7422(h) to preclude refund suits that are not premised on review of an administrative adjustment request under Section 6228(b) or an erroneous computational adjustment under Section 6230(c). *Kaplan* v. *United States*, *supra*; *Thomas* v. *United States*, *supra*; *Williams* v. *United States*, 97-1 U.S. Tax Cas. (CCH) ¶ 50,444, (E.D. Ky. 1997), appeal pending, No. 97-5820 (6th Cir.); *Anderson* v. *United States*, *supra*.[2]

b. Petitioners err in contending (Pet. 8) that 26 U.S.C. 7422(h) does not apply to a tax attributable to a partnership item that is collected from a partner after the statute of limitations for assessment has expired. It is well established that the general taxpayer refund suit made available

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[2] None of the partners of The Securities Group filed a petition in court contesting the FPAA on any ground. Petitioners wander off the point in noting (Pet. 9) that the Anti-Injunction Act does not preclude the issuance of injunctive relief against collection when the taxpayer shows that the government can not prevail on the merits and that no alternative means exist for challenging the validity of the tax (*South Carolina* v. *Regan*, 465 U.S. 367, 378-379 (1984)). Since the tax at issue in this case has already been collected, there is obviously no basis for invoking equitable jurisdiction to enjoin collection. *Kroger* v. *United States*, 755 F.2d 1094, 1096 (4th Cir. 1985). See also *Singer Mfg. Co.* v. *Wright*, 141 U.S. 696 (1891). Moreover, a suit by any partner would fall within the strictures of the Anti-Injunction Act because he "had earlier opportunities, of which he failed to avail himself, to challenge the partnerships' reported income" (*Randell* v. *United States*, 64 F.3d at 108).

under 28 U.S.C. 1346(a)(1) "must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit" and that "the first" of these provisions is 26 U.S.C. 7422 (*United States* v. *Dalm*, 494 U.S. 596, 601 (1990)). The plain language of 26 U.S.C. 7422(h) provides that no action may be brought to recover taxes attributable to partnership items except in limited circumstances that are indisputably not present here. No applicable waiver of sovereign immunity permits a refund suit to proceed in these circumstances.

Moreover, the record of this case does not support petitioner's contention that the statute of limitations had expired before the assessment was made in this case. The statute of limitations for making an assessment of taxes attributable to a partnership item is normally three years from the due date of the partnership return or the time the return is filed, whichever expires later. 26 U.S.C. 6229(a). It is six years in the case of fraud (if the partner is not complicit) or in the case of a substantial omission from gross income. 26 U.S.C. 6229(c)(1), (c)(2). Under 26 U.S.C. 6229(c)(3), the statute of limitations does not begin to run until the partnership files a return. The statute of limitations is tolled during the 150 days an FPAA may be contested in court and until such a court proceeding is final, plus one year, under 26 U.S.C. 6229(d)). Moreover, because it is impossible to make an assessment against an unknown partner, the statute is also tolled during the time an indirect partner is "[u]nidentified" in IRS records and for one year thereafter. 26 U.S.C. 6229(e).

The assessment in this case was made on September 17, 1990 (Pet. App. A3).[3] Petitioners contend (Pet. 3) that the statute of limitations expired on March 13, 1989, one year and 150 days after the mailing of the FPAA. That contention, however, ignores the unexpired portion of the limitations period at the time the FPAA was mailed. 26 U.S.C. 6229(d) only suspends the period of limitations; it does not terminate the limitations period 150 days plus one year after the mailing of the FPAA, as petitioners mistakenly assume. The appropriate method for computing the length of the limitations period is to add the applicable statutory period—whether three years or six—to the tolling period under 26 U.S.C. 6229. Petitioners did not plead or prove the date that the 1983 return of The Securities Group was filed. Consequently, the record does not support their contention that the assessment period expired on March 13, 1989.

Moreover, petitioners failed to show that Mr. Vann, an indirect partner in The Securities Group via Securities Group 1980 and Kent Associates II, had been identified to the IRS as a partner. Unless the IRS already had such information, the statute of limitations on assessing taxes against him was tolled under 26 U.S.C. 6229(e) until his name, address, taxpayer identification number and profits interest were furnished, and for one year there-

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[3] Contrary to petitioners' contention (Pet. 5-6, 7), the district court did not determine that the assessment was untimely. The court merely recounted the contention that it was time-barred (Pet. App. A3, A8, A9) and concluded that a suit brought on that theory did not fall within the grounds permitted by 26 U.S.C. 7422(h) (Pet. App. A9).

after. Petitioners' assertion that the assessment was untimely thus lacks support in the record. The issues for which petitioners seek review (Pet. 5) are therefore not presented on the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1998

APPENDIX

26 U.S.C. 6229 provides in relevant part:

(a) **General Rule**

Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

* * * * *

(d) **Suspension when Secretary makes administrative adjustment**

If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended—

(1) for the period during which an action may be brought under section 6226 (and, if an action with respect to such administrative adjustments is

brought during such period, until the decision of the court in such action becomes final), and

(2) for 1 year thereafter.

(e) **Unidentified partner**

If—

(1) the name, address, and taxpayer identification number of a partner are not furnished on the partnership return for a partnership taxable year, and

(2)(A) the Secretary, before the expiration of the period otherwise provided under this section with respect to such partner, mails to the tax matters partner the notice specified in paragraph (2) of section 6223(a) with respect to such taxable year, or

(B) the partner has failed to comply with subsection (b) of section 6222 (relating to notification of inconsistent treatment) with respect to any partnership item for such taxable year,

the period for assessing any tax imposed by subtitle A which is attributable to any partnership item (or affected item) for such taxable year shall not expire with respect to such partner before the date which is 1 year after the date on which the name, address, and taxpayer identification number of such partner are furnished to the Secretary.